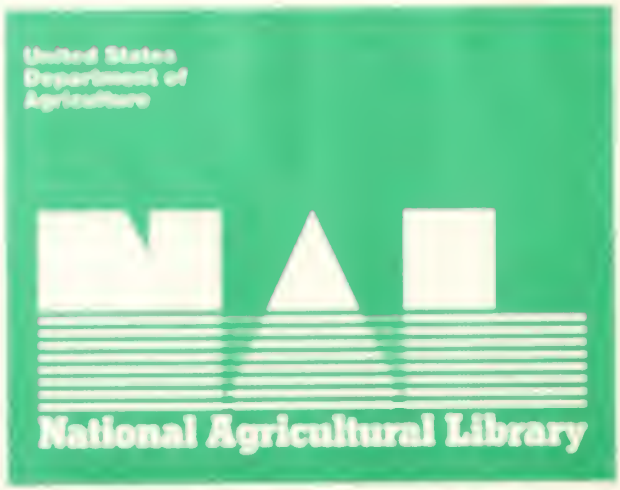
ABANDONMENT AND LOSS OF INDIANS' WINTERS DOCTRINE RIGHTS AND THOSE OF THE NATION AS A WHOLE

William H. Veeder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OF
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SUMMARY

Crucial to the State of Montana - all Western States, and their inhabitants, particularly the Indians who reside in those Western States, are recent far-reaching developments in regard to the 'Winters Doctrine Rights' to the use of water. Those rights were reserved by the United States of America in the streams or other sources of water which arise upon, border upon, or traverse Indian Reservations, National Forests, Parks, Grazing Districts, Recreational Areas, Wildlife Refuges and other reservations. Montana's Winters Decision involving the Fort Belknap Indian Reservation gave rise to that all-important doctrine. (Winters v. United States 207 U.S. 564 (1908)). There follows a brief summary of a detailed consideration of the source of title and the nature of "Winters Doctrine Rights" and the sound legal concepts upon which those rights are predicated; the dissipation of those rights with attendant far-reaching injurious precedents in connection with that dissipation.

A. Invaluable Character of 'Winters Doctrine Rights Contrasted With Rights Acquired Pursuant to State Law

"Winters Doctrine Rights" are unique in the field of Western Water Law. They differ drastically from, and by reason of their nature are vastly superior to, the rights privately acquired through compliance with State law.

(i) Source of Title, Date of Acquisition and Chain of Title

"Winters Doctrine Rights" were acquired by the National Government

as part and parcel of the lands ceded to it by Treaties with the Indians, Mexico, France, and Great Britain. Title to those rights was invested in the United States of America on the date the Treaties became effective. An unbroken chain of title to those "Winters Doctrine Rights" from the time of their cession resides in the National Government.

(ii) Date of Reservation Signifies Only as Time After Which "Winters Doctrine Rights" Were No Longer Open to Private Acquisition

Those ceded "Winters Doctrine Rights" to the use of water were reserved from and after the date that the lands of which they are a part were no longer unqualifiedly subject to sale or disposition. That change of status from rights which are available for acquisition to reserved status in no way changed the source or title, date of acquisition, or character of the rights involved.

(iii) National Government Has Power To Exercise or To Refrain From Exercising "Winters Doctrine Rights"; They May Be Exercised At Present Or Held For The Future

As owner of the ceded "Winters Doctrine Rights", the United States of America in the exercise of its Constitutional powers, and subject to the Constitutional guarantees to privately acquired rights, may exercise those "Winters Doctrine Rights" in any manner or for any purpose; or it may change the manner and purpose for which those rights are exercised; or refrain from exercising them. Use has nothing to do with their acquisition and nonuse will not result in their loss.

"Winters Doctrine Rights" are held by the United States of America in trust for the Indians or for all of the people for present and/or future use.

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(iv) Winters Doctrine Rights Differ Radically From and Are Vastly Superior to Rights Acquired Pursuant to State Law

"Winters Doctrine Rights" differ radically from and are vastly superior to rights acquired pursuant to State law. Unlike riparian rights, for example, they are held exclusively, not correlatively, as in the nature of a tenancy in common. Differing further from riparian rights, they are not limited to use within the watershed of the stream or other source of water.

"Winters Doctrine Rights" are likewise far superior to appropriative rights, which must be acquired pursuant to State law. As Congress has unlimited power over the "Winters Doctrine Rights" they may be exercised for any purpose, at any place, and the purposes and places may be changed by the will of Congress. These are some of the invaluable features of "Winters Doctrine Rights" as contrasted with appropriative or riparian rights acquired under State law.

Source of titles to private appropriative rights is the National Government. Those private titles are acquired by compliance with and are subject to State law. Those rights may be used only at the places and for the purposes prescribed by State law.

B. Legal Principles Giving Rise To "Winters Doctrine Rights" Must Be Preserved

Preservation of the "Winters Doctrine Rights" for the Indians and the Nation as a whole is essential. To the Indians "Winters Doctrine Rights" guarantee future development; to the Nation as a whole those rights constitute a sound legal predicate for the long-range development of land and water resources within the National Forests, Parks and other

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National reservations. Maintenance of the integrity of the 'Winters Doctrine Rights' is the keystone of a National policy if the full potential of our natural resources is to be attained.

C. Plain and Serious Errors Have Been Committed Abridging the Principles Upon Which 'Winters Doctrine Rights' Are Predicated

Irreparable damage to Indians' Winters Doctrine Rights and to the National Government as a whole has occurred by reason of the construction placed by the Department of Justice upon the recent Supreme Court Decision of Arizona v. California. (373 U. S. 546 (1963)). Moreover, from that construction by the Department of Justice there has emerged a most injurious precedent adhered to in litigation now being prosecuted in a Utah State court. That construction is contained in directions to the United States Attorney in Salt Lake City, Utah, and in the advice given to the principal legal officers of Interior and Agriculture:

(a) '* * * Arizona v. California * * * dates reserved water right priorities * * * on Indian reservations from the time of the creation of the reservation * * *.'

(b) That decision "dates reserved water right priorities on national forests and national recreation areas' the same as 'on Indian reservations'.

(c) Abandonment of 'Winters Doctrine Rights' in the Utah case follows from the direction to claim in that litigation the 'earlier priority as between the right acquired under state law and the federal reservation.

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Grave error is contained in every aspect and feature of the quoted instructions to the United States Attorney and the advice to the mentioned Departments. Genesis of that error stems:

> From the failure to comprehend that title to the 'Winters Doctrine Rights' which were reserved, resided in the United States of America at the time of the reservation. Inceptive date of title was not the time that the rights were reserved. That date was when the rights were ceded to the National Government. (See above A, B). All that was accomplished by the reservation was thereafter to preclude private acquisition of those rights pursuant to the provisions of the Desert Land Act of 1877.

An additional element in the error is that "priority dates partake of the vesting of title to appropriative rights. That concept is wholly foreign to 'Winters Doctrine Rights' the title to which vested at the time of cession.

Results of the error to perceive that the United States could only reserve rights title to which resided in it will now be considered.

(i) Abandonment of 'Winters Doctrine Rights' Through Attempted Substitution of State Appropriative Rights

Abandonment of invaluable rights of the National Government is implicit in every phase of the above-quoted directions to the United States Attorney and advice to the Departments. Most anomalous aspect of the instructions, however, is that which directs assertion of a claim based upon State law if it is earlier than the date of the reservation.

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Thus the United States Attorney is instructed to attempt an exchange of an invaluable "Winters Doctrine Right," title to which presently resides in the United States, for a State appropriative right with all the serious limitations and restraints imposed by State law. (See A above). Moreover, the attempted substitution of an inferior appropriative right for a "Winters Doctrine Right" is made irrespective of the fact that the United States of America cannot comply with State law. Thus the incredibly erroneous instruction is underscored.

Loss of the "Winters Doctrine Rights" in the Utah litigation is but one factor. Involved is a broad and far-reaching precedent. If that precedent is not reversed irreparable damage will be experienced by the Indians and the Nation as a whole throughout the West. It is again emphasized that when the United States of America purportedly acquires a State appropriative right on its reserved lands it is in truth and fact appropriating a right title to which already resides in it. The United States of America cannot legally be in a position of appropriating a right from itself.

(ii) Severance of Chain of Title to "Winters Doctrine Rights" - Abandonment of Invaluable Property Rights of National Government

Failure to claim title to the "Winters Doctrine Rights" as of the date of cession and attempting to establish the inceptive date of title as a "priority" from the date of reservation, has three immediate effects: (a) Loss of invaluable property rights, title to which is in the Nation, by abandoning the true date of acquisition; (b) Severance of the chain of title which relates back to the cession to the National Government of the "Winters Doctrine Rights;" (c) Purported creation of

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a right stripped of the invaluable characteristics, as to purposes of use and related features, which pertain to "Winters Doctrine Rights" as reviewed in A above and which have no relationship to State appropriative rights.

(iii) Irreparable Damage to All Indians

The clearly erroneous construction of the Indians' "Winters Doctrine Rights" in Arizona v. California results in irreparable damage to those rights as they relate to that case; establishes a most injurious precedent in regard to the "Winters Doctrine Rights" of all Indian Tribes in the West.

D. Grave and Damaging Error By Appearance In Utah Litigation - the United States of America Has Not Waived Its Immunity From Suit Under the Circumstances

Congress has not authorized the appearance of the Department of Justice in the Utah litigation. Absent that consent the course of action is invalid. Yet as stated, the appearance does irreparable damage to the "Winters Doctrine Rights."

Congress has not consented to the attempted submittal to the jurisdiction and control of the State court of Utah of widely scattered, disconnected and unrelated springs, dry gulches and wells which are found dispersed over a wide desert area owned by the National Government. The course pursued in that action is wasteful of Federal funds, totally futile, and completely needless.

The attempted appearance, though gravely in error, is not the most important factor. Involved is the adoption of a far-reaching policy determination. Entailed is the incorrect assertion of the "Winters

Doctrine Rights'; the erroneous concept that 'Winters Doctrine Rights", invaluable in character, can by executive fiat be exchanged for State appropriative rights.

CONCLUSION

The Department of Justice has erred in a manner most serious. Irreparable damage will ensue if that Department does not reverse the interpretation it has placed upon Arizona v. California; abandon the course it has pursued in the Utah litigation; and defend rather than dissipate our Nation's 'Winters Doctrine Rights.'

This Summary is followed by a full consideration of the facts, law, history, and policy in this all-important course of events which will have far-reaching effects upon all of Western United States.

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William H. Veeder

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INTRODUCTION

Montana, indeed every Western State, in which there are situated Indian Reservations, National Forests, Parks, and similar areas, has a large stake in preserving the principles of the Winters Doctrine enunciated by the Supreme Court in 1908.[1/] Since its pronouncement those who seek to strip the Indians of their invaluable rights to the use of water and invade the "reserved rights" of the United States have attacked the Doctrine, always attempting to limit its operation or to construe it away. This consideration is directed to the most recent events in regard to the history of that Doctrine.

Generally it may be stated that the Winters Doctrine established the principle that the United States of America, at the time Indian Reservations were created, not only reserved the land but likewise "reserved rights to the use of water" for the lands, measured not by the then existing needs but for the future. Sound legal analysis fully supports the Winters Doctrine. Equally important, however, are the humanitarian principles that guided the Court in rendering the opinion. Rejecting the arguments advanced by those who insisted the Indians had been segregated on lands which were uninhabitable, the Supreme Court stated:

> The lands were arid and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government.

1/ Winters v. United States, 207 U.S. 564 (1908).

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> The lands ceded were, it is true, also arid; and some argument may be urged, and is urged, that with their cession there was a cession of the waters, without which they would be valueless, and 'civilized communities could not be established thereon.' And this, it is further contended, the Indians knew, and yet made no reservation of the waters. We realize that there is a conflict of implications, but that which makes for the retention of the waters is of greater force than that which makes for their cession.' 2/

Continuing, the Court declared:

> 'The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. * * * That the government did reserve them we have decided, and for a use which would be necessarily continued through years.' 3/

There is thus expressed not only the Winters Doctrine of implied reservation of rights to the use of water, but the rationale behind it. As stated, that far-reaching declaration has been a bastion against repeated efforts to seize the rights of the Indians.

In the recent decision of Arizona v. California 4/ the Supreme Court adopted the Winters Doctrine in connection with other Federal

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2/ Winters v. United States, 207 U.S. 564, 576 (1908).
3/ 207 U. S. 564, 577 (1908).
4/ Arizona v. California, 373 U.S. 546 (1963).

Reservations:

> '* * * the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. * * *.' 5/

The Supreme Court further declared 'that the United States intended to reserve water sufficient for the future requirements' of the National Forests and similar National preserves. 6/

The decision of Arizona v. California should be accepted as a logical extension of the Winters Doctrine to other lands reserved by the United States of America and viewed as a great forward step in the field of water conservation and utilization. Yet within weeks after the opinion was rendered, the import of it was challenged and a most damaging construction placed upon it. That challenge stemmed from litigation now pending in the State of Utah. The facts of that case will be briefly reviewed.

WINTERS DOCTRINE IS MISCONSTRUED IN UTAH LITIGATION

A concrete example of the challenge to the Winters Doctrine arises in the case entitled: "IN THE MATTER OF THE GENERAL DETERMINATION OF THE RIGHTS TO THE USE OF ALL THE WATER * * * WITHIN THE DRAINAGE AREA OF THE BEAVER RIVER-ESCALANTE VALLEY * * *" 7/ which embraces a vast,

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5/ 373 U. S. 546, 601 (1963).
6/ 373 U. S. 546, 601 (1963).
7/ 'IN THE MATTER OF THE GENERAL DETERMINATION OF THE RIGHTS TO THE USE OF ALL THE WATER, BOTH SURFACE AND UNDERGROUND, WITHIN THE DRAINAGE AREA OF THE BEAVER RIVER-ESCALANTE VALLEY, AND ALL TRIBUTARIES IN MILLARD, BEAVER, IRON, WASHINGTON, KANE AND GARFIELD COUNTIES IN UTAH", In The District Court of the Fifth Judicial District, In and For Iron County, State of Utah.

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largely desert region in Southwest Utah. There the United States of America is the owner of thousands of acres of withdrawn lands administered by the Bureau of Land Management of the Department of the Interior and the Forest Service of the Department of Agriculture. Widely scattered over this immense area are small springs, intermittent streams and similar sources of water in which the United States of America is the owner of invaluable 'reserved rights."

The manner in which the principles of the Winters Doctrine are applied in the cited case and other litigation is of transcendent importance. Failure correctly to assert the Winters Doctrine will cause irreparable damage to the Nation as a whole and to the Indians in particular.

Proceeding in the cited case purportedly in conformity with 43 U.S.C. 666, the State of Utah served the Attorney General of the United States of America. Without being directed to interpose objection to the jurisdiction of the court, the United States Attorney in Salt Lake City was given these wholly erroneous instructions to appear and represent the National Government:

> "In view of the holding in Arizona v. California, 373 U. S. 546, 601, which dates reserved water right priorities on national forests and national recreation areas as well as those on Indian reservations from the time of the creation of the reservation, we now feel that we have the right and duty to claim the earlier priority as between the right acquired under state law and the federal reservation in making Water User's Claims.
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> * * *

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"As the decision in Arizona v. California requires that the United States water priorities on reserved land be dated from the time of the reservation, we are making the effort to submit the Water User's Claims on reserved lands in a form that will enable the State Engineer to readily comply with the federal law. * * *" [8] (Emphasis supplied)

Likewise failing correctly to interpret the Winters Doctrine, the Departments of Interior [9] and Agriculture [10] were advised by Justice:

"In view of the holding in Arizona v. California, 373 U. S. 546, 601, which dates reserved water right priorities on national forests and national recreational areas as well as those on Indian reservations from the time of the creation of the reservation, we now feel that it is essential to claim the earlier priority as between the right acquired under state law and the federal reservation in making Water User's Claims."

In the consideration which follows there are reviewed in some detail the effect of the quoted instructions and advice.

Entailed In the Utah Case Is The Construction of the Winters Doctrine Which Embraces Principles of Jennison v. Kirk; [11] Winters Decision; [12] California-Oregon Power Company Decision; [13] Pelton Decision; [14] and Three Decisions of Arizona v. California [15]

The above-quoted advice given and the instructions promulgated

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8/ Letter dated November 21, 1963.
9/ Letter dated November 6, 1963.
10/ Letter dated November 8, 1963.
11/ 98 U.S. 453 (1878).
12/ Winters v. United States, 207 U.S. 564 (1908).
13/ California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1934).
14/ Federal Power Commission v. Oregon, 349 U.S. 435 (1954).
15/ 283 U.S. 423 (1930); 298 U.S. 558 (1935); 373 U.S. 546 (1963).

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by the Department of Justice will govern to a marked degree the application of the principles enunciated in the cited decisions. Failure properly to apply them will have a most far-reaching and adverse effect in the field of conservation and utilization of water resources throughout the Nation as a whole.

QUESTIONS PRESENTED

There follow certain of the questions calling for a resolution in connection with the Winters Doctrine:

1. What is the date when title to the "reserved rights to the use of water" became vested in the United States of America or the Indians, based upon the Winters Doctrine?

2. What are the legal nature and measure of the "Winters Doctrine Rights" title to which resides in the United States of America or in the Indians? Are they comparable to appropriative, riparian or prescriptive rights under the laws of the several States?

3. What is the effect of attempted compliance by agents of the National Government with State laws governing the acquisition of rights to the use of water upon the "Winters Doctrine Rights"?

4. What is the course which the United States of America should pursue in regard to the protection of its "Winters Doctrine Rights" and those of the Indians when it is made a party defendant in an

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action brought pursuant to 43 U.S.C. 666 purporting to waive the sovereign immunity of the Federal Government from suits in proceedings initiated generally to adjudicate rights to the use of waters 'of a river system or other source.'

Correctly to respond to the questions entails a review of basic and far-reaching principles which must be upheld if the Winters Doctrine is not to be abrogated in whole or in part.

MONTANA'S INDIAN DECISION DECLARING WINTERS DOCTRINE PROTECTS INDIANS AND IS A BASIS FOR NATIONAL POLICY RESPECTING WATER RESOURCES

Most crucial single opinion relating to the rights to the use of water claimed and exercised by the United States of America was rendered in connection with Montana's Fort Belknap Indian Reservation. That case arose by reason of a conflict over the rights and interests in the Milk River of the Indians as they pertained to claims of non-Indians who predicated their rights upon the laws of Montana. Principal matter for resolution by the Supreme Court was whether when the lands were set aside for the Indians there were reserved rights to the use of water from the Milk River without which the lands could not be successfully farmed. That query was of particular importance because no mention was made of rights to the use of water when the lands constituting the Reservation were withdrawn from the much larger area.

Having summarized the issues, the Supreme Court stated in these terms: 'The case, as we view it, turns on the agreement of May, 1888, resulting in the creation of the Fort Belknap Reservation. * * *' 16/ In rejecting contentions that (a) rights to the use of water were not

16/ Winters v. United States, 207 U.S. 564, 576 (1908).

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reserved for the Indians; (b) rights claimed pursuant to State law would take precedence over those of the Indians if there had been a reservation of them, the Supreme Court declared:

> 'The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. * * * That the government did reserve them, we have decided, and for a use which would be necessarily continued through years.' 17/

There was thus first enunciated by the Supreme Court the Winters Doctrine of implied reservation of rights to the use of water from streams which border upon or traverse the lands reserved by the Indians themselves or reserved for them by the United States of America. Since that pronouncement there have been numerous decisions throughout Western United States reiterating the Winters Doctrine and applying it to specific factual situations. 18/

In the Ahtanum Decision, Judge Pope, speaking for the Court of Appeals for the Ninth Circuit, placed the 'reserved rights' in their proper perspective when he declared

> '* * * that the paramount right of the Indians * * * was not limited to the use of the Indians at any given date but this right extended to the ultimate needs of the Indians.' 19/

17/ 207 U. S. 564, 577 (1908).
18/ United States v. McIntire, 101 F.2d 650 (C.A.9, 1939); Conrad Investment Co. v. United States, 161 Fed. 829 (C.A.9, 1908). United States v. Walker River Irrigation Dist., 104 F.2d 334 (C.A.9, 1939 United States v. Ahtanum Irrigation District et al., 236 F.2d 321 (C.A.9, 1956); Cert. denied, 352 U.S. 988 (1956).
19/ 236 F.2d 321, 327 (C.A.9, 1956).

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Adopting the rationale of that case the Special Master in Arizona v. California declared: * * * I have concluded that reservations of water by the United States included enough to supply expanding needs regardless of state water law.[20] According approval to the concept thus expressed, the Supreme Court in affirming the Special Master, stated:

> We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations.[21]

Winters Doctrine Applied to National Forests, Wildlife Refuges and Recreational Areas

Reviewed above is the Winters Doctrine declaring that there resides in the United States of America the power to 'reserve' rights to the use of water for Indian lands and to 'exempt them from appropriation under the state laws * * *.'

In the Report of the Special Master in Arizona v. California there were set forth at some length the rights of the United States of America in connection with its National Forests, Wildlife Refuges and Recreational Areas in the Lower Basin of the Colorado River.[22] Emphasized by the Master is the principle that 'In the Winters case the United States exercised its power to reserve water by a treaty; but the power itself stems from the United States' property rights in the water, not from the treaty power. Since the United States has the power to reserve water, by treaty, against appropriation under state law, there

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20/ Report of Special Master, pp. 261-262.
21/ Arizona v. California, 373 U.S. 546, 600 (1963).
22/ Report of Special Master, pp. 254 et seq.

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is no reason why it lacks the power to do so by statute or executive order." [23] (Emphasis supplied)

Too great stress may not be placed upon the concept thus expressed that the 'property rights in the water' are the source of the power to "reserve" those rights. Crux of the entire matter thus does not turn upon some regulatory authority as that term is generally used in regard to interstate commerce; rather it turns upon the investiture of title in the Central Government. Nature of those 'reserved rights' and the date of the investiture of that title are most important features of this consideration.

Adhering to that above-quoted concept of the law, the Special Master viewed the variety of claims asserted by the United States of America. First of those claims to which reference is here made relate to the Gila National Forest. In his Report the Special Master alludes to the fact that the United States of America '* * * claims rights to water from sources within the drainage area of the Gila River System for use in National Forests, * * *.' [24]

"* * * The finding is warranted that the United States intended, when it withdrew this Forest from entry, to reserve the water necessary to fulfill the purposes for which the Forest was created. * * *

> The power of the United States to make such a reservation with respect to the Forest cannot be logically differentiated from the power of the United States with respect to Indian Reservations * * *.' [25]

23/ Report of Special Master, page 259.
24/ Report of Special Master, page 334.
25/ Report of Special Master, page 335.

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Reflective of that thinking are comparable statements of the Special Master regarding other areas carved out and reserved by the National Government from the 'public lands' for use by all of the citizens of this Country: * * * I conclude that the United States had the power to reserve water in the Colorado River for use in the Lake Mead National Recreation Area for the same reasons that it could reserve such water for Indian Reservations.[26] As to Wildlife Refuges established in furtherance of the objectives of treaties with Mexico and Great Britain the Special Master likewise declared: "* * * I have previously concluded that the United States had the power to reserve unappropriated water in the Colorado River for the future requirements of the Indian Reservations and a National Recreation Area and I can perceive no material distinction between them and wildlife refuges.[27]

In adopting the legal reasoning of the Special Master the Supreme Court first turned to the sources of Constitutional power from which stems the Nation's authority to administer its properties. On the subject it stated: 'Arizona's contention that the Federal Government had no power, after Arizona became a State, to reserve waters for the use and benefit of federally reserved lands rests largely upon statements in Pollard's Lessee v. Hagan * * * and Shively v. Bowlby * * *. * * * They [the cases] do not determine the problem before us and cannot be accepted as limiting the broad powers of the United States to regulate navigable waters under the Commerce Clause and to regulate government lands under

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26/ Report of Special Master, page 292.
27/ Report of Special Master, page 297.

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Art. IV, Section 3, of the Constitution. We have no doubt about the power of the United States under those clauses to reserve water rights for its reservations and its property.[28]

The Supreme Court then reiterated and reaffirmed the Winters Doctrine.[29] Relative to the matter it stated: "The question of the Government's implied reservation of water rights upon the creation of an Indian Reservation was before this Court in Winters v. United States, 207 U.S. 564, decided in 1908."[30] It then announced the rule reviewed above that the reserved rights' of the Indians were to satisfy '* * * the future as well as the present needs of the Indian Reservations * * *."[31] Significant in regard to the 'present ' and 'future" reserved rights of the National Government is the principle similarly announced by the Court that they

> "having vested before the [Boulder Canyon Project] Act became effective on June 25, 1929, are 'present perfected rights' * * *."[32] (Emphasis supplied)

Subsequently in this review in connection with the nature, extent and measure of rights to the use of water the importance of the declaration that the reserved rights are "present perfected rights" though largely unexercised is underscored.

In these terms the Winters Doctrine was extended to other reservations created by the National Government out of the lands title to

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28/ Arizona v. California, 373 U.S. 546, 597-598, (1963).
29/ 373 U. S. 546, 600 (1963).
30/ 373 U. S. 546, 599, 600 (1963).
31/ 373 U. S. 546, 600 (1963).
32/ 373 U. S. 546, 600 (1963).

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which resides in it:

> The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the Master that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest.[33] (Emphasis supplied)

It is impossible to perceive a more far-reaching construction of the principles of the Winters Doctrine. Yet as reviewed above, and as will be reviewed in the succeeding consideration, the Department of Justice has placed constructions upon that decision in other areas which can only result in irreparable damage to the Indians and to the Nation as a whole.[34]

SOURCES OF TITLE OF, AUTHORITY OVER AND THE ADMINISTRATION OF, RIGHTS TO THE USE OF WATER OWNED BY THE NATIONAL GOVERNMENT

(a) Rights to the Use of Water Interests in Real Property

It is, of course, elemental that the rights to the use of water reserved by the United States of America are interests in real property.[35] Rules governing the sale and transfer of real estate are

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33/ Arizona v. California, 373 U.S. 546, 601 (1963).
34/ See above pages 4 and 5.
35/ Wiel, Water Rights in the Western States, 3d ed., Vol. 1, Sec. 18, pp. 20, 21; Sec. 283, pp. 298-300; Sec. 285, p. 301.

equally applicable to the conveyance of rights to the use of water. On the subject it has been stated that, The conveyance must be in writing, as of an interest in real estate within the statute of frauds.[36] The Supreme Court, in keeping with those principles, has declared unappropriated rights to the use of water to generate electricity are rights in real property.[37]

Date of the investiture of title is the prime element in the value of any right to the use of water in the semiarid West, whether acquired by the sovereign pursuant to a treaty or an individual pursuant to the local laws.[38] For, where the demand so greatly exceeds the supply, the ownership or control of the legal right first to divert and use water, or to allow others to use it is of transcendent importance. It is axiomatic that he who controls the rights to the use of water likewise controls the utilization of the land. As a consequence, it is essential to consider the source of the title and the date of investiture of that title to "Winters Doctrine Rights".

(b) "Winters Doctrine Rights" Acquired by United States Through Cession From Indians, France, Mexico and Great Britain

Vast areas of lands were ceded by the Indian Tribes to the United States of America in the Western part of this country. Nature of the transfer from the Indians to the National Government is well stated by the Supreme Court in these terms:

36/ Wiel, Water Rights in the Western States, 3d ed., Vol. 1, Sec. 542 et seq., p. 580.

37/ United States v. Chandler-Dunbar Co., 229 U.S. 53, 73 (1913); Ashwander v. T.V.A., 297 U.S. 288, 330 (1935).

38/ Nichols v. McIntosh, 19 Colo. 22; 34 Pac. 278 (1893); See also Whitmore v. Murray City, 107 Utah 445; 154 P.2d 748, 751 (1944).

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"* * * the treaty [between the Yakimas and the United States] was not a grant of rights to the Indians, but a grant of rights from them - a reservation of those not granted."[39]

Pertinent here is the fact that the Ahtanum Decision relied upon by the Special Master in Arizona v. California,[40] has this to say:

"That the Treaty of 1855 reserved rights in and to the waters of this stream for the Indians, is plain from the decision in Winters v. United States * * *[41] * * *
'the treaty was not a grant of rights to the Indians, but a grant of right from them - a reservation of those not granted.' * * * Before the treaty the Indians had the right to the use not only of Ahtanum Creek but of all other streams in a vast area. The Indians did not surrender any part of their right to the use of Ahtanum Creek * * *."[42] (Emphasis supplied)

As a consequence it is highly important to keep in the foreground that the Treaties between the United States of America and the Tribes of Indians resulted in both a reservation of the rights to the use of water from the streams which border upon or traverse their properties and a transfer of the rights in streams which are not similarly situated.

Treaties with France in 1803 invested the United States of America with title to the vast area referred to as the Louisiana Purchase;

39/ United States v. Winans, 198 U.S. 371, 381 (1904).
40/ Report of Special Master, pp. 258, 261.
41/ United States v. Ahtanum Irrigation District, et al., 236 F.2d 321, 325, (1956); Cert. denied, 352 U.S. 988 (1956).
42/ Ibid., 236 F.2d 321, 326 (1956).

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in 1848 Mexico, by the Treaty of Guadalupe Hidalgo, conveyed to the United States of America the part of this country generally referred to as the Southwest; and Great Britain, in 1846, ceded to the National Government that area referred to as the Pacific Northwest.[43] Each of the cessions passed title, subject to then vested rights, to all of the lands and rights to the use of water which were part and parcel of them.[44] By those cessions not only the title but complete jurisdiction in the fullest legal sense passed to the Central Government over * * * all lands, lakes and rivers * * *.[45] Full import of the legal aspects of the investiture of complete title has been reviewed at length by the Supreme Court.[46]

(c) History of Western Development Underscores Ownership and Control by United States of America of Rights to the Use of Water On Its Public Lands

Here it is essential to establish the difference between "public lands" and "reservations" of the United States of America. On the subject it has been stated: "'Public lands' are lands subject to private appropriation and disposal under public land laws. 'Reservations' are not so subject."[47] It has likewise been declared that: "It is a familiar principle of public land law that statutes providing generally for

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43/ Wiel, Water Rights in the Western States, Vol. 1, pp. 66 et seq.
44/ Jennison v. Kirk, 98 U.S. 453 (1878);
California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1934);
Hough v. Porter, 51 Ore. 318; 95 Pac. 732 (1908); 98 Pac. 1083 (1909); 102 Pac. 728 (1909).
45/ Vattel, The Law of Nations or the Principles of Natural Law, Vol. III, Text of 1758, Translation, page 102.
46/ United States v. California, 332 U.S. 19 (1946).
47/ Federal Power Commission v. Oregon, 349 U.S. 435, 443, 444 (1954).

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disposal of the public domain are inapplicable to lands which are not unqualifiedly subject to sale and disposition because they have been appropriated to some other purpose.'[48] In this phase of the consideration the comments are directed primarily to the public lands.'

To a large extent the history of the West constitutes a review of the manner in which the principles of Western Water Law became established. It likewise evidences the relationship between the National Government and the pioneers who went upon the 'public lands' and formulated those principles. In that connection it has been correctly stated that: 'The law of prior appropriation of water originated among the miners of California in the earliest days of that State * * *.'[49] From the same authoritative source this statement is taken: 'Under the theory upon which the law of appropriation arose, and what is still the theory of the California doctrine, several appropriators on the same stream upon public land * * * bear to each other the relation of successive grantees of parcels of one original holding, namely, of the sole right to the waters held by the United States as original owner. Like successive grants between private parties, where they conflict, the later one can hold only what was left after the earlier one was made.'[50] Thought expressed in that last quoted excerpt is twofold: It recognizes that title to the appropriative right to the use of water upon the public domain stems from the United States of America;[51] it recognizes that the 'priority date' establishes the relationship between successive

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48/ United States v. O'Donnell, 303 U.S. 501, 510 (1937).
49/ Wiel, Water Rights in the Western States, Vol. 1, 3d ed., Sec. 66, p. 66.
50/ Wiel, Water Rights in the Western States, Vol. 1, 3d ed., Sec. 299, p. 307.
51/ California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 162 (1934).

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holders of appropriative rights on the public lands all of whose rights stemmed from the National Government.[52]

From a leading case of Jennison v. Kirk,[53] referred to above, further insight is gained as to the history of the doctrine of prior appropriation. There it is pointed out that: For eighteen years - from 1848 [the date of the Treaty of Guadalupe Hidalgo] to 1866 - the regulations and customs of miners, as enforced and moulded by the courts and sanctioned by the legislation of the State,

> constituted the law governing property in mines and in water on the public mineral lands.[54]

It is stated in the decision that those laws: '* * * recognized discovery, followed by appropriation, as the foundation of the possessor's title, and development by working as the condition to its retention. * * * The first appropriator was everywhere held to have, within certain well-defined limits, a better right than others to the claims taken up; and in all controversies, except as against the government, * * *. But the mines could not be worked without water. * * * To carry water to mining localities * * * became, therefore, an important and necessary business in carrying on mining.

> Here, also, the first appropriator of water to be conveyed to such localities for mining or other beneficial purposes, was recognized as having, to the extent of actual use, the better right."[55]

52/ California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 162 (1934), citing Howell v. Johnson

53/ 98 U.S. 453, 457-458 (1878).

54/ 98 U.S. 453, 458 (1878).

55/ 98 U.S. 453, 457-458 (1878).

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Applying those principles of local law - in the light of the Act of 1866 - the court concluded: * * * the owner of a mining claim and

> the owner of a water-right enjoy their respective properties from the dates of their appropriation, the first in time being the first in right

but where both rights can be enjoyed without interference with or material impairment of each other, the enjoyment of both is allowed. 56/ As Congress had not authorized acquisition of rights to the use of water there was no law other than that which grew up among the miners. To correct that situation Congress adopted the Act of 1866 57/ which provides that:

> * * * whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same * * *.

That quoted Congressional enactment is adjudged by the Supreme Court to have this effect:

> The object of the section was to give the sanction of the United States, the proprietor of the lands.

56/ 98 U. S. 453, 461 (1878).
57/ (14 Stat. 253); 43 U.S.C. 661; 98 U.S. 453, 456 (1878).

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to possessory rights, which had previously rested solely upon the local customs, laws, and decisions of the courts, and to prevent such rights from being lost on a sale of the lands."[58]

By way of emphasis the Court, in the cited decision, reiterated the proposition that "* * * the general purpose of the Act [of 1866] * * * was to give sanction of the government to possessory rights acquired under the local customs, laws, and decisions of the courts."[59]

Subsequently the Congress adopted the Desert Land Act of 1877[60] which in part declared in connection with settlers on the 'public land' that "* * * the right to the use of water * * * shall depend upon bona fide prior appropriation" leaving all 'surplus water' over and above that actually appropriated "free for the appropriation and use of the public * * *."

Further light is thrown upon the historical development of Western Water Law by the case of Lux v. Haggin, from which this statement is taken: "* * * By the Treaty [of Guadalupe Hidalgo] the public property of Mexico passed to the United States. * * *"[61] Continuing, the court stated: * * * from a very early day the courts of this state [California] have considered the United States government as the owner of such running waters on the public lands of the United States * * * Recognizing the United States as the owner of the lands and waters, and as therefore authorized to permit the occupation and diversion of the waters as

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58/ Jennison v. Kirk, 98 U.S. 453, 456-457 (1878).
59/ 98 U.S. 453, 461 (1878).
60/ 43 U.S.C. 321.
61/ Lux v. Haggin, 69 Cal. 255; 10 Pac. 674, 714 (1886).

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distinct from the lands, the state courts have treated the prior appropriator of water on the public lands of the United States as having a better right than a subsequent appropriator, on the theory that the appropriation was allowed or licensed by the United States." 62/ Identically the same concepts respecting the source of title to appropriative rights is to be found in many other Federal and State court decisions.

Concurrence with those concepts is to be found in one of the above-cited leading decisions of the Supreme Court. 63/ On the subject it declared:

> As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. Howell v. Johnson, 89 Fed. 556, 558." 64/

Continuing in regard to the lands and rights to the use of water ceded to the National Government in the arid West, the Supreme Court declared: * * * Congress intended to establish the rule that for the future [after 1877] the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named [43 U.S.C. 323] 65/ Full import of the language used by the Supreme Court in the quotations which precede is gained from a consideration of the Montana decision of Howell v. Johnson cited and relied upon by the Court. At issue in the

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62/ Lux v. Haggin, 69 Cal. 255; 10 Pac. 674, 721 (1886).
63/ See above, pages 16 and 17.
64/ California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 162 (1934).
65/ 295 U.S. 142, 162 (1934).

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case was the source of title to claimed rights to divert and utilize waters from a stream flowing over and across the "public lands" of the United States. Relative to the question the Court stated: "The rights of plaintiff do not, therefore, rest upon the laws of Wyoming, but upon the laws of congress.

"The legislative enactment of Wyoming was only a condition which brought the law of congress into force. The national government is the proprietor and owner of all the land in Wyoming and Montana which it has not sold or granted to some one competent to take and hold the same.

> Being the owner of these lands, it [the United States] has the power to sell or dispose of any estate therein or any part thereof. The water in an innavigable stream flowing over the public domain is a part thereof, and the national government can sell or grant the same, or the use thereof, separate from the rest of the estate, under such conditions as may seem to it proper. 66/

In rendering the California-Oregon Power Company Decision, the Supreme Court not only relied upon the Montana case of Howell v. Johnson, it likewise cited as authoritative the "well reasoned" Oregon decision of Hough v. Porter 67/ which compares the power of the National Government to grant its rights to the use of water with that exercised in disposition of mineral rights upon those lands. This statement is likewise taken from a frequently cited case

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66/ Howell v. Johnson, 89 Fed. 556, 558 (C.C.D. Montana, 1898).
67/ 51 Ore. 318; 95 Pac. 732 (1908); 96 Pac. 1083 (1909); 102 Pac. 758 (1909).

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from Oregon: '* * * the waters of non-navigable streams are part of such public domain, and hence the property of the government, which may lay hold of them, without taking any of the steps made necessary to obtain a usufructuary interest therein by private individuals.' 68/

Simply stated, the California-Oregon Power Company Decision recognizes that Congress permitted the States to decide the manner in which there could be acquired, and the character of the title to, rights to the use of water which would pass from the National Government into private ownership. That principle was, as has been observed, applicable to "public lands'. In regard to the acquisition from the United States of America through compliance with State law the Supreme Court said this in the California-Oregon Power Company opinion: '* * * following the act of 1877 * * * all non-navigable waters then a part of the public domain became publici juris, subject to the pleaary control of the designated states * * * with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain. * * * The Desert Land Act does not bind or purport to bind the states to any policy. It simply recognizes and gives sanction, in so far as the United States and its future grantees are concerned, to the state and local doctrine of appropriation, * * *.' 69/

(Emphasis in part supplied)

Clear beyond question from that statement is, of course, the principle

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68/ Nevada Ditch Co. v. Bennett, 30 Ore. 59, 104; 45 Pac. 472, 484-485 (1896).

69/ California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 163-164 (1934).

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that the source of the title to rights appropriated upon the 'public lands' is the United States of America. Equally manifest is that the unappropriated rights to the use of water which are part and parcel of the 'reserved' lands are not open to private acquisition.[70]

(d) Principles of Winters Doctrine Logical Sequitur of Basic Precepts of International, Statutory and Decisional Law

From the authorities reviewed above it is manifest that the National Government is empowered by the Constitution to dispose of its public lands and rights to the use of water which were a part of them, together or dispose of them separately. In the comments which follow the power to 'reserve' those rights to the use of water will next be considered.

(i) Key Decisions Complement Each Other

Important in regard to the future administration of the National Government's reserved lands and rights to the use of water is the broad Constitutional basis upon which it is predicated. That freedom to control the use of its properties is without regard to State law. "A different rule would place the public domain of the United States completely at the mercy of state legislation."[71] For example, the United States of America is independent from interference by local governments in the establishment of National Forests[72] and the formulation of needful rules for the administration of them.[73] As reviewed above, the source of the authority thus to effectuate the will of the Nation is Article IV,

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70/ Federal Power Commission v. Oregon, 349 U.S. 435 (1954).
71/ Camfield v. United States, 167 U.S. 518, 526 (1896).
72/ Light v. United States, 220 U. S. 523, 536 (1911).
73/ United States v. Grimaud, 220 U.S. 506, 521 (1911).

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Section 3, Clause 2 of the Constitution. When acting within the purview of that authorization the power of Congress over reserved lands and rights to the use of water is unlimited. 74/

(ii) Power to reserve rights

In the immediately preceding paragraphs the power of the United States of America to administer its property has been discussed. It was in the exercise of that power in connection with the Indians that gave rise to the Winters Doctrine which established the precept that: "The power of the government to reserve the waters and exempt them from appropriation under the state law is not denied, and could not be." 75/ Arizona v. California, as stated, further recognized those principles in connection with the National Forests and other Federal Reservations.

"WINTERS DOCTRINE RIGHTS" OF THE NATIONAL GOVERNMENT DIFFER GREATLY FROM PRIVATE RIGHTS ACQUIRED PURSUANT TO STATE LAW

There have been reviewed previously certain prime factors respecting the "Winters Doctrine Rights" of the United States of America. Among other things (a) title to them became invested in the National Government when they were ceded to it; (b) they were subject to disposition with the land or separate from it; (c) they were either disposed of or reserved pursuant to the broad Constitutional power residing in the Central Government.

Those 'Winters Doctrine Rights', moreover, differ very greatly from the rights, titles to which have been privately acquired pursuant

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74/ United States v. San Francisco, 310 U. S. 16 (1939).
75/ Winters v. United States, 207 U. S. 564, 577 (1908).

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to the laws of the several States. By brief reference to some of the more salient characteristics of the last mentioned rights the existing differences between those rights and the 'Winters Doctrine Rights' will be better demonstrated.

(a) 'Winters Doctrine Rights to the Use of Water Are Not Riparian In Character

The doctrine of riparian rights to the use of water has been rejected in the States of Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah and Wyoming. Other States in varying degrees recognize the common law riparian rights. California is the principal State in that regard. That State and the other Western States that take cognizance of riparian rights likewise recognize appropriative rights with the result that they are referred to as hybrid States.

Examination of the principal characteristics of the riparian doctrine is thus warranted. Perhaps the prime factor in regard to those rights is that they are part and parcel of the land and do not exist independent of it.[76] Moreover, a riparian right is held and exercised correlatively with all other riparian owners as a tenancy in common and not a separate or severable estate.[77] Quite obviously the concept of the 'reserved right' in the National Government is wholly at variance with the limitations which are present in a tenancy in common. Further, 'A riparian owner has no right to any mathematical or specific amount of the waters of a stream as against other like owners.'[78] That aspect

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76/ The California Law of Water Rights, p. 187.
77/ Seneca Consolidated Gold Mines Co. v. Great Western Power Co., 209 Cal. 206; 287 Pac. 93, 98 (1930).
78/ Prather v. Hoberg, 24 Cal 2d 549; 150 P.2d 405, 410 (1944).

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of the riparian right results from the fact that those rights are held correlatively with all other riparians. As a consequence the quantity of water riparian owners may use must be "reasonable" in the light of the claims of all other riparians. Reasonableness is, of course, a variant depending upon the supply of water, the demands which differ from day to day, and a multitude of other factors.[79]

Equally at odds with the concept of the 'Winters Doctrine Rights" of the United States is this limitation upon the exercise of rights riparian in character: "'The land, in order to be riparian, must be within the watershed of the stream'. The rule as stated in another case is that:

> 'Land which is not within the watershed of the river is not riparian thereto, and is not entitled, as riparian land, to the use or benefit of the water from the river, although it may be part of an entire tract which does extend to the river * * *!'[80]

There is, of course, no basis in law which would limit the exercise of 'Winters Doctrine Rights" to the watershed in which they are situated. Moreover, the laws of the States could not thus restrict the power of Congress over the properties of the Nation.[81]

(b) "Winters Doctrine Rights" To the Use of Water Are Not Prescriptive In Character

There is no basis whatever for asserting the 'Winters Doctrine

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79/ The California Law of Water Rights, Measure of Riparian Right, pp. 218 et seq.

80/ The California Law of Water Rights, pages 202 et seq.

81/ United States v. San Francisco, 310 U.S. 16 (1939).

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Rights" were acquired by the United States of America through adverse possession. They were conveyed outright to the National Government. Title to those rights now resides in it by reason of the cessions alluded to above. There are neither facts to sustain, nor any reason for, an assertion that the Federal Government has exercised the "Winters Doctrine Rights" in an open, notorious, hostile manner for a period which would give rise to a claimed right by prescription. Elemental though that statement may be, it demonstrates the disparity between ceded rights - "Winters Doctrine Rights" - and others.

(c) "Winters Doctrine Rights" of the National Government Differ Drastically From Appropriative Rights to the Use of Water

In the preceding review there is set forth the historic development of the doctrine of prior appropriation.[82] As demonstrated, the doctrine of prior appropriation was the outgrowth of the local laws governing the respective rights of private claimants upon the "public land." They deraigned title to those rights from the National Government.[83] As stated above:

> "The rights of * * * [appropriators upon public lands] do not, therefore, rest upon the laws of Wyoming, but upon the laws of congress.
>
> "The legislative enactment of * * * [the State] was only a condition which brought the law of congress into force."[84]

82/ See above, "History of Western Development," &c, pages 16 et seq.
83/ Jennison v. Kirk, 98 U.S. 453, 457-458 (1878).
84/ Howell v. Johnson, 89 Fed. 556, 558 (C.C.D. Mont. 1898); California-Oregon Power Company v. Beaver Portland Cement Co., 295 U.S. 142, 162 (1934).

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In the Utah case [85] there is thus presented the anomaly of the National Government's attempted compliance with the laws of the State respecting the acquisition of appropriative rights when title to the rights involved resides in it.

(i) 'Winters Doctrine Rights' Were Ceded, Not Appropriated

As discussed above, title to the 'reserved rights' passed to the United States of America by cession. That means of acquiring title differs radically from the requirements for obtaining title to appropriative rights, all as pointed out in one of the decisions entitled Arizona v. California. From that case this statement is taken:

> "To appropriate water means to take and divert a specified quantity thereof and put it to beneficial use in accordance with the laws of the State where such water is found, and, by so doing, to acquire under such laws, a vested right to take and divert from the same source, and to use and consume the same quantity of water annually forever, subject only to the right of prior appropriations." [86]

The Supreme Court then concluded with this all-important statement as to the primary element giving rise to an appropriative right:

> '* * * the perfected vested right to appropriate water flowing within the State cannot be acquired without the performance of physical acts through which the water is and will in fact be diverted to beneficial use.' (Emphasis supplied)

85/ See above, pages 3 et seq.
86/ Arizona v. California, 283 U.S. 423, 459 (1930).

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Utah's Supreme Court enunciated exactly the same principles:

> "Under our laws, rights in and to the use of public waters, or of a natural stream or source, may be acquired only by appropriation and by an actual diversion of waters from the natural channel or stream and a beneficial use made of them * * *. * * * it is an indisputable requisite that there must be an actual diversion of the water from its natural channel into the appropriator's ditch, canal, reservoir or other structures." 87/ (Emphasis supplied)

These requisites of the investiture of title to an appropriative right have been declared by Utah's highest court: "The three principal elements to constitute a valid appropriation * * * are: (1) An intent to apply it to some beneficial use; (2) a diversion from the natural channel * * * (3) an application of it within a reasonable time to some useful industry * * *." 88/ Manifestly the "rights reserved" by the United States of America as recognized under the "Winters Doctrine" were ceded to it and need not be - indeed could not be - appropriated in conformity with the preceding requirements of State law.

(ii) "Winters Doctrine Rights" Cannot Be Measured In the Manner Applicable to Appropriative Rights

"Winters Doctrine Rights" in the words of the Supreme Court, are reserved for uses "which would be necessarily continued through

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87/ Bountiful City v. DeLuca, 72 A.L.R. 657; 77 Utah 107; 292 Pac. 194, 199 (1930).

88/ Sowards v. Meagher, 37 Utah 212; 108 Pac. 1112, 1116 (1910).

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years'[89] and "to satisfy the future as well as the present needs **."[90] Variances between the "Winters Doctrine Rights" and appropriative rights are thus clearly defined. A 'future use' is entirely foreign to the doctrine of appropriation of right. Under the latter concept of Western Water Law it has been declared by Utah's Supreme Court that 'Beneficial use is the basis, the measure and the limit of all rights to the use of water in this state.'[91] That statement is a reflection of the statutory law of Utah which declares that 'The appropriation must be for some useful and beneficial purpose * * *.'[92] In keeping with those tenets of Western Water Law the decision last cited states: "No one can acquire the right to use more water than is necessary, with reasonable efficiency, to satisfy his beneficial requirements * * *," and it must be used with due diligence.[93]

It is, however, recognized by the courts that the Indians' rights are not thus limited for "We deal here with the conduct of the Government as trustee for the Indians. It is not for us to say to the legislative branch of the Government * * * when those rights are to be exercised.[94] That principle, of course, prevails in regard to other "Winters Doctrine Rights."

89/ Winters v. United States, 207 U. S. 564, 577 (1908).
90/ Arizona v. California, 373 U. S. 546, 600 (1963).
91/ McNaughton v. Eaton, 121 Utah 394; 242 P.2d 570, 572 (1952).
92/ Utah Code Annotated 1953, Sec. 73-3-1.
93/ McNaughton v. Eaton, 121 Utah 394; 242 P.2d 570, 572 (1952).
94/ United States v. Ahtanum Irrigation District, et al., 236 F.2d 321, 328 (C.A.9, 1956); Cert. denied, 352 U.S. 988 (1956).

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(iii) "Winters Doctrine Rights" Have Date of Acquisition Not "Priority Date" as Term Is Used for Appropriative Rights

Date when the "Winters Doctrine Rights" were ceded to the United States of America is the date of acquisition of them. There is no basis in law for claiming a "priority date" for them as is asserted in connection with an appropriative right privately acquired pursuant to State law.

In the preceding review of the historical development of the doctrine of prior appropriation, it was emphasized that the National Government, far from being an appropriator of rights to the use of water, was the source of the title to those rights.[25] Brief reference to the inceptive dates of titles to appropriative rights to the use of water further demonstrates the anomaly of claiming "priority dates" for "Winters Doctrine Rights."

In its 1936 Arizona v. California Decision,[96] the Supreme Court succinctly presents the priority date concept as follows: "The appropriator first in time is prior in right over others upon the same stream, and the right, when perfected by use, is deemed effective from the time the purpose to make the appropriation is definitely formed and actual work upon the project is begun, or from the time statutory requirements of notice of the proposed appropriation are complied with, provided the work is carried to completion and the water is applied to a beneficial use with reasonable diligence." (Emphasis supplied).

By that pronouncement the Supreme Court was reiterating the basic law respecting "priorities" among appropriators. Its statement

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[25] See above, pages 17 et seq.
[96] Arizona v. California, 298 U.S. 558, 566 (1936).

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clearly differentiates the latter right from the 'Winters Doctrine Right' ceded to the National Government. For, as stressed above, the United States of America is the owner of "Winters Doctrine Rights" and capable of reserving them without formulating an intention to divert the water and use it with reasonable diligence in contemplation of the State law.

To be observed in that connection, the Supreme Court refers to the 'perfected' appropriative right becoming vested when all requirements of intent and overt acts have been completed. However, in regard to the 'Winters Doctrine Rights," they were declared by the Court to be "present perfected rights" [97] by the single act of withdrawing unappropriated rights from the operation of the Desert Land Act of 1877 and related Acts. Further review is unnecessary to demonstrate the drastic and far-reaching difference between 'Winters Doctrine Rights' and those appropriated pursuant to State law.

(d) Attempted Subversion of "Winters Doctrine Rights" to State Control Creates Legal Impasse - Constitutional Impossibility

Some of the most damaging features of the attempted submittal of the 'Winters Doctrine Rights' to State control relate to the limitations upon the use and place of use which would occur if that submittal were possible, which is denied. [98] In that regard Utah's statutes provide that, "*** changes of point of diversion, place or purpose of use of water including water involved in general adjudication or other suits, shall be made in the manner provided herein and not otherwise.

97/ Arizona v. California, 373 U. S. 546, 600 (1963).
98/ See infra, page 34.

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"No permanent change shall be made except on the approval of an application therefor by the state engineer. * * *."[22] (Emphasis supplied)

Incongruous feature of the instruction of the Department of Justice is the fact that ostensibly the National Government would be subject to those strict limitations contained in the quoted statute. Yet there is a great need to administer the Winters Doctrine Rights free from State restraint. Most important is the freedom to change the uses made of Winters Doctrine Rights. Reference in that connection is directed to a previously cited case in which the Supreme Court of the United States declared in regard to Winters Doctrine rights within the Yosemite National Park and the Stanislaus National Forest: "Article 4, Sec. 3, Cl. 2 of the Constitution provides that 'The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States.' The power over the public land thus entrusted to Congress is without limitation [citing United States v. Gratiot, 39 U.S. 526 (1840)] 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. [Citing Light v. United States, 220 U.S. 523, 537 (1911)] Thus, Congress may constitutionally limit the disposition of the public domain to a manner consistent with its views of public policy.

And the policy to govern the disposal of rights to develop hydroelectric power in such public lands,

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22/ Utah Statutes Annotated 1963 Pkt. Supp. 73-3-3.

may, if Congress chooses, be one designed to avoid monopoly * * *."[100]

Moreover, the Congressional power over the public lands and "reserved rights to the use of water" is not subject "to veto" by the States.[101]

IMPOSSIBILITY OF COMPLIANCE BY THE NATIONAL GOVERNMENT WITH UTAH'S LAWS - IRREPARABLE DAMAGE TO THE UNITED STATES OF AMERICA

(a) The United States of America Cannot Comply With Utah Law - Yet United States Attorney Instructed to Claim Priority for Rights Acquired Under State Law

Obvious from the instructions of the Department of Justice to its United States Attorney and the advice to the Departments of Agriculture and Interior[102] is a failure to recognize that the National Government cannot comply with the laws of Utah. Barrier to acquisition by the National Government of appropriative rights pursuant to Utah laws are the conditions imposed by those laws. Reference in that regard is made to the requirements that water must be diverted and applied to a beneficial use by the appropriator before a right may be acquired.[103] As the United States of America does not use the water it could not, under Utah law, acquire rights to it. The water in question is used by private livestock owners who graze the lands in common. In regard to that inability on the part of the United States of America to comply with Utah law, reference is made to this declaration by Utah's Supreme Court: "* * * the appropriation must be one that inures to the exclusive benefit of the appropriator and

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100/ United States v. San Francisco, 310 U.S. 16, 29-30 (1939).
101/ Federal Power Commission v. Oregon, 349 U.S. 435, 445 (1954).
102/ See above, pages 4 and 5.
103/ See above, pages 29 and 30.

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subject to his complete dominion and control." [104] (Emphasis supplied) To claim the rights here involved for stockwater, recreation, and domestic uses are for the exclusive benefit of the United States of America is simply contrary to fact. Further, there is no basis to constitute those who use the waters agents on behalf of the United States of America.

An additional barrier to the acquisition of State appropriative rights by the National Government stems from the fact that there must be diversion and use of the waters for which the appropriative rights are claimed. Utah's court has declared that animals drinking directly from a source of water do not effectuate an appropriation. [105]

From those precepts of Utah's laws there is one factor which is abundantly clear:

> The United States of America should not attempt to and legally cannot comply with the laws of Utah which were written for the purpose of regulating the respective rights of its citizens and not the National Government.

(b) Winters Doctrine Rights' Should Not Be Subjected to Control of Utah's Court and State Engineer - Were That Possible, Which Is Denied

Without regard to great loss of invaluable 'Winters Doctrine Rights' if its instructions were carried out, the Department of Justice directs the United States Attorney to claim the earlier priority as between the right acquired under state law and the federal reservation.

104/ Lake Shore Duck Club v. Lake View Duck Club, et al., 50 Utah 76; 166 Pac. 309, 311 (1917).

105/ Adams v. Portage Irrigation Reservoir and Power Co., 95 Utah 1; 72 P.2d 648, 653 (1937); Bountiful City v. DeLuca, 77 Utah 107; 292 Pac. 194, 199 (1930).

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There is, of course, a fundamental and basic error in the instruction. For the State of Utah could not in the pending action recognize "Winters Doctrine Rights" ceded to the National Government by Mexico. On the subject it is declared that "Rights to the use of the unappropriated public waters in this state may be acquired only as provided in this title."[106] (Emphasis supplied) Underscoring that proposition is this language from the same source: "No appropriation of water may be made and no rights to the use thereof initiated * * * except application for such appropriation first be made to the state engineer in the manner hereinafter provided, and not otherwise." There is thus declared the strict doctrine of prior appropriation adhered to historically in the State of Utah.[107] A positive statutory limitation precludes the State court of the State of Utah from awarding a priority for the "Winters Doctrine Rights" which obviously were not acquired pursuant to the laws of Utah. Indeed, the State Engineer objects to recognizing other than rights acquired pursuant to State law.

An example demonstrates the incongruity of the situation where an effort is made to warp the "Winters Doctrine Rights" into the Utah laws. In that regard it is declared in Arizona v. California:

> "We agree * * * that the United States intended to reserve water sufficient for the future requirements of the * * * Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge * * *."[108]

106/ Utah Statutes Annotated 1953, 73-3-1.
107/ Stowell v. Johnson, 7 Utah 215; 26 Pac. 290 (1891).
108/ Arizona v. California, 373 U. S. 546, 601 (1963).

However, the Supreme Court of Utah has declared that an appropriative right could not be acquired for the precise purpose for which the Supreme Court recognized a "Winters Doctrine Right" in the National Government for the Wildlife Refuge. This basic language has been used: "To our minds it is utterly inconceivable that a valid appropriation of water can be made under the laws of this state [for wild waterfowl], when the beneficial use of which, after the appropriation is made, will belong equally to every human being who seeks to enjoy it. It would be little short of an anomaly in any system of jurisprudence that would authorize the restraining of a person from diverting water used solely for the propagation of ducks, and then deny injunctive, or any, relief against the same person if he should enter upon the land irrigated, shoot the ducks ad libitum, and appropriate them to his own use. If the beneficial use for which the appropriation is made cannot, in the nature of things, belong to the appropriator, of what validity is the appropriation? The very purpose and meaning of an appropriation is to take that which was before public property and reduce it to private ownership. The whole procedure under our statute, relating to an appropriation of water, is a series of steps to that end. * * *

'It certainly must be conceded that the purpose of the law is to endow the appropriator of the water with all the insignia of private ownership. The certificate is his deed; his evidence of title, good, at least against the state, for all it purports to be, and good as against every one else who cannot show a superior right."[109/]

109/ Lake Shore Duck Club v. Lake View Duck Club, 50 Utah 76, 166 Pac. 309, 310-311 (1917).

The Duck Club Case emphasizes the impossibility of the National Government complying with State law. As pointed out, a careful examination of the Utah law fails to disclose authority which would permit recognition of the 'Winters Doctrine Rights' in that State. Fundamental and sharp variances between the latter rights and Utah's appropriative rights explain the total want of authority permitting recognition of the 'Winters Doctrine Rights.

Efforts in the past to submit the properties of the National Government to State control have all failed. For, as the Supreme Court has stated, the result would "* * * place the public domain of the United States completely at the mercy of state legislation."[110] In the 1930 Arizona v. California Decision in regard to the attempted control of the Secretary of the Interior by State water law, the Court declared: 'The United States may perform its functions without conforming to the police regulations of a State."[111] Thus the Constitutional barriers to the instructions to the United States Attorney are again emphasized.[112]

ANOMALY OF UNITED STATES OF AMERICA ATTEMPTING TO ACQUIRE RIGHTS WHICH IT ALREADY OWNS

The United States Attorney is apparently directed to abandon 'Winters Doctrine Rights' in exchange for a State appropriative right if the 'priority" of the latter is earlier than the date of reservation. In substance, the United States would be attempting to appropriate rights from itself.[113] From the instructions this anomaly emerges:

110/ Camfield v. United States, 167 U.S. 518, 526 (1896).
111/ Arizona v. California, 283 U.S. 423, 451 (1930).
112/ See above, pages 4 and 5.
113/ See above, pages 21 et seq.

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(a) The United States of America is the owner of invaluable 'Winters Doctrine Rights';

(b) Irrespective of that present ownership, the United States Attorney is directed to assert a claim for an appropriative right purportedly based upon the compliance by the National Government with State law.

By that course of action the highly valuable 'Winters Doctrine Right' is abandoned and an inferior right accepted, assuming the United States of America can comply with State law, which is denied. Unavoidably the circumstance described above calls for an analysis of the validity of the direction to the United States Attorney and the actual compliance with the instruction. Generally the properties of the United States may not be lost by the conduct of its officers.[114] Here, however, a claim based upon an alleged State right is asserted in a Utah court; that is tantamount to an abandonment of the 'Winters Doctrine Right" upon the entry of the judgment. Irreparable damage ensues as a consequence..

"WINTERS DOCTRINE RIGHTS" HAVE ONE SIGNIFICANT DATE: WHEN THEY WERE CEDED TO THE UNITED STATES OF AMERICA, NOT DATE OF RESERVATION

(a) United States of America Must Claim Cession Date for "Winters Doctrine Rights"

It has been authoritatively stated that 'in this country we are to look to the federal government and its grants for the source of

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114/ Utah Power and Light Co. v. United States, 243 U. S. 389 (1916); United States v. California, 332 U. S. 19, 40 (1946).

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all title to lands * * *."[115] As seen above, that statement embraces rights to the use of water in Western United States which are part and parcel of the land. Consequently there is no basis for asserting that title became vested in the United States of America to "Winters Doctrine Rights" other than the date they were ceded to it. To repeat: In the Utah litigation as in Arizona v. California, July 4, 1848, is the date when Mexico by the Treaty of Guadalupe Hidalgo ceded the rights which are very largely involved.[116] To claim any other date is to indulge in a fiction which cannot be supported in law.

(b) Date of Opening Surplus Waters to Acquisition on "Public Lands" Has No Bearing on "Winters Doctrine Rights"

As pointed out in Jennison v. Kirk,[117] eighteen years were to elapse between 1848 when the rights involved in Arizona v. California and in the Utah litigation were acquired by the United States of America and the year 1866[118] when Congressional sanction was given to private rights on the public domain claimed pursuant to local laws and customs. Eleven years more were to elapse before the Desert Land Act of 1877[119] when surplus waters on the "public lands" were made available for acquisition. Those dates are without significance in regard to the "Winters Doctrine Rights." They simply establish the time the "Winters Doctrine Rights" could have been acquired pursuant to the laws last mentioned, but were not acquired prior to their withdrawal. Rights which were privately acquired prior to the withdrawal are, of course, recognized.

115/ Thompson on Real Property, 1957 Replacement, 5A Section 2710.
116/ In the Lower Basin of the Colorado River a small portion of the rights were ceded by the Gadsden Purchase, 10 Stat. 1031.
117/ 98 U.S. 453 (1878).
118/ 43 U.S.C. 661.
119/ 43 U.S.C. 321 et seq.

(c) Title to 'Winters Doctrine Rights' In No Way Related to Date of Their 'Reservation'; They Were Simply No Longer Open to Private Acquisition

Title to or the date of acquisition of the 'Winters Doctrine Rights' owned by the United States of America were in no way altered by the fact that they were reserved by the United States and no longer subject to private acquisition under the Desert Land Act of 1877. Thereafter the rights were reserved for the Indians or for the benefit of the Nation as a whole. That withdrawal of the 'Winters Doctrine Rights' cannot be viewed as the inceptive date of title, which is the substance of the Justice Department instructions.[120]

(d) Winters Doctrine was Not Abridged by Arizona v. California

In these terms the basic principles of the Winters Doctrine were reaffirmed, not abridged, by the recent decision of Arizona v. California: 'Winters has been followed by this Court as recently as 1939 in United States v. Powers, 305 U. S. 527. We follow it now and

> agree that the United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created.[121]

Key to that ruling is the term 'effective.' What was 'effective'? It was the withdrawal of rights to the use of water acquired by the United States of America in the year 1848, from the application of the Desert Land Act of 1877 which had made them available for private acquisition.

120/ See above, pages 4 and 5.
121/ Arizona v. California, 373 U. S. 546, 600 (1963).

Continuing on the subject the Supreme Court stated:

> 'This means, as the Master held, that these water rights, having vested before the Act became effective on June 25, 1929, are 'present perfected rights' and as such are entitled to priority under the [Boulder Canyon Project] Act." (Emphasis supplied)

Meaning of the term 'present perfected rights' which are recognized under the Boulder Canyon Project Act, is of great importance. Reference in that connection is made to the Act which provides, among other things, for the approval of the Colorado River Compact.[122] Contained in that Compact are these provisions:

> "Article VII Nothing in this Compact shall be construed as affecting the obligations of the United States of America to Indian tribes.
>
> "Section VIII Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this Compact * * *. (Emphasis supplied)

Thus there is disclosed the source of the term 'present perfected rights.' Vital in that connection is the fact that those 'present perfected rights' are 'to satisfy the future as well as the present needs of the Indian Reservations.' Those needs to be measured by the quantity of water "to irrigate all practicably irrigable acreage on the reservations."[123] Manifestly the 'priority' of the 'Winters Doctrine Rights' as thus

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122/ 43 U.S.C. 617 1 et seq.
123/ Arizona v. California, 373 U.S. 546, 600 (1963).

recognized by the Supreme Court does not partake of the "priority date" recognized under the doctrine of prior appropriation. Inceptive date of title for an appropriative right, as stated in the 1936 Arizona v. California decision is established as follows: * * * The appropriator first in time is prior in right over others upon the same stream,

> and the right, when perfected by use, is deemed effective from the time the purpose to make the appropriation is definitely formed and actual work upon the project is begun * * * provided the work is carried to completion and the water is applied to a beneficial use with reasonable diligence." [124] (Emphasis supplied)

Obviously from the foregoing the "reserved rights" of the Indians - their "Winters Doctrine Rights" - must not be confused with appropriative rights. They were not perfected by use. They were acquired by cession. Their withdrawal was "effective" from the date of reservation. The vast disparity is thus demonstrated between the meaning of the term "priority" under the Boulder Canyon Project Act in regard to "Winters Doctrine Rights" and the term "priority date" as used in connection with the rights acquired from the National Government through compliance with State law. [125]

Any attempt to apply the principles of the doctrine of prior appropriation both as to their "priority dates" and/or the character of their use to the "Winters Doctrine Rights constitutes an abridgement of the Winters Doctrine which must not be tolerated.

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[124] Arizona v. California, 298 U.S. 558, 566 (1936).
[125] See above, pages 19 et seq.

There is presented this question:

Does the recent Arizona v. California Decision date "reserved water right priorities * * * on Indian reservations from the time of the creation of the reservation * * *" as the Justice Department states? 126/

Answer to that inquiry is emphatically No. There is surely no express ruling to that effect; from the preceding analysis there is no legal basis thus to abridge the title to 'Winters Doctrine Rights' by implication.

The Special Master used the term 'priority dates.' 127/ He concludes as a matter of law that the United States reserved 'the right to the annual diversion of * * * 11,340 acre-feet of water with a priority of February 2, 1907 * * *.' Surely that statement does not warrant the conclusion that the Special Master "dates the reserved water rights" of the Indians "from the time of the creation of the reservation." As fully discussed above, the Indian rights in Arizona v. California were acquired in 1848. The "1907" date quoted above simply means the rights dating back to 1848 were not after 1907 open to private acquisition.

As will be discussed in the paragraphs which succeed, the interpretation of the Department of Justice constitutes an abandonment of invaluable property rights of the Indians. Those instructions, moreover, direct an abandonment of the rights of the Nation as a whole in connection with National Forests, Recreation Areas, Parks and Grazing Districts.

126/ See above, pages 4 and 5.
127/ Report of Special Master, pages 267 et seq.

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IRREPARABLE DAMAGE TO INDIANS AND UNITED STATES OF AMERICA AS A WHOLE BY (a) SEVERANCE OF CHAIN OF TITLE TO "WINTERS DOCTRINE RIGHTS" (b) ABANDONMENT OF INVALUABLE RIGHTS

(a) Severance of Chain of Title to "Winters Doctrine Rights" Results In Irreparable Damage

There is a direct and unbroken chain of title to the "Winters Doctrine Rights" in the United States of America from the Indians, France, Mexico and Great Britain.[128] On the subject this authoritative statement has been made: The United States became vested with title to all the lands within the territorial limits of California * * * by the Treaty of Guadalupe Hidalgo.

* * *

"Hence, in this country we are to look to the federal government and its grants for the source of all title to lands * * *."[129] Source of title to the "Winters Doctrine Rights" involved in both Arizona v. California and the Utah litigation is, of course, the same as the title to land of which they are a part.[130] Preserving an unbroken chain of title to the "Winters Doctrine Rights" is no less vital to the National Government and the Indians than is preservation of a comparable title to the land. It was in connection with that unbroken chain of title to "Winters Doctrine Rights" that the Supreme Court, in the Winters Case recognized the power of the United States to "reserve the waters and exempt them from appropriation under state law * * *." That power, as the

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128/ See above, pages 14 et seq.
129/ Thompson on Real Property, 1957 Replacement, 5A, Section 2710.
130/ See above, pages 16 et seq.

Special Master observes stems from the United States' property rights in the water.[131] It was the unbroken chain of title to which the Court referred in Arizona v. California when it stated:

> 'We * * * agree that the United States did reserve water rights for the Indians effective as of the time the Indian Reservations were created.
>
> * * * that the water was intended to satisfy the future as well as the present needs of the Indian Reservations * * *.
>
> * * * the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. * * *[132]

Equally clear is that absent ownership of title to the unappropriated rights on the 'effective' date of the reservation the Court could not have stated: 'We have no doubt about the power of the United States under these [the Property and Commerce] Clauses [of the Constitution] to reserve water rights for its reservations and its property.'[133]

Plain and serious error is thus contained in the conclusion of the Department of Justice that the Arizona v. California Decision dates the 'Winters Doctrine Rights' from the time of the reservation. Reason for that error by the Department of Justice is this:

> It has confused the meaning of "effective date of the reservation. Rather than correctly viewing

131/ Report of Special Master, page 259.
132/ Arizona v. California, 373 U. S. 546, 600-601 (1963).
133/ Ibid., 373 U.S. 546, 598.

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it as withdrawing the then vested and existing rights from the status of being open for private acquisition, it has declared the inceptive date of title is the time of the reservation of those rights - a conclusion wholly contrary to fact and law.

Irreparable damage through the loss of invaluable rights is the result of that erroneous construction. Adopting that erroneous construction as a precedent in the Utah litigation demonstrates the far-reaching nature of the error.

(b) Irreparable Damage Through Abandonment of Invaluable Property Result of Erroneous Construction of Arizona v. California

The construction placed upon Arizona v. California by the Department of Justice must necessarily cause irreparable damage to the United States of America in regard to the "Winters Doctrine Rights which are there involved. Most serious damage is to the Indian rights involved in that case.

Losses of the nature mentioned are not limited to the Lower Basin of the Colorado River. Irreparable damage to the rights and interests of the National Government will necessarily occur in the Utah litigation if the instructions given by the Department of Justice are carried out. Implicit in those instructions is the ground which gives rise to the damage. There the United States Attorney is directed to claim "the earlier priority as between the right acquired under state law and the federal reservation." Recognized by the direction is the undeniable fact in the semiarid West that the one who has the earliest investiture of title has the most valuable right. Error in the instruction is thus not

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the failure to recognize the principle involved, but failure to recognize that 1848 is the year from which the United States of America must assert its claim or abandon invaluable property interests.

Abandonment of the 1848 date is no mere technical oversight. It is tantamount to abandoning upwards to a half century of time during which title resided in the United States of America. That constitutes abandonment of invaluable property rights. For the Utah Supreme Court has said regarding the date when title to rights becomes vested:

'Property rights in water consist not alone in the amount of the appropriation, but, also, in the priority of an appropriation. It often happens that the chief value of an appropriation consists in its priority over other appropriations from the same natural stream. Hence, to deprive a person of his priority is to deprive him of a most valuable property right. * * * '[134/]

Although a priority date is a misnomer in regard to the 'Winters Doctrine Rights', nevertheless the right to date title to them back to 1848 is invaluable. If abandoning a state statutory priority would amount to the loss of a most valuable property right * * * , then it follows a fortiori that the failure to claim the date of acquisition of the 'Winters Doctrine Rights' is a far greater loss. For as manifested above, the latter rights are of infinitely greater value than the more limited appropriative rights.

134/ Whitmore v. Murray City, 107 Utah 449; 154 P.2d 786, 791 (1944).

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(c) Irreparable Damage to United States of America Through Limitations Upon Uses

Immense value must be ascribed to the "Winters Doctrine Rights" because they may be, as distinguished from appropriative rights, used for any purpose - or not used.

Those rights being under the unlimited power of Congress, the uses may legally be changed at its will.[135] The need to assert that "Winters Doctrine Rights" may be used for any purpose is of extreme importance not only for the Indians but for the National Forests and other reservations. Changing conditions will call for a change of uses. For example, in the future the Indians must be free to use their waters for municipal and industrial purposes. They must not be held to agricultural uses in perpetuity.[136] Arizona v. California did not pass upon the right to change uses. It simply established a ceiling for the quantity available for use.

Yet in the Utah litigation the procedures require the filing of a claim for a particular use, with full and complete description of it. That use for the rights involved will be decreed. Immediate damage to the Nation as a whole results from attempted limitation upon uses in the Utah litigation. Assuming the Court has

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135/ See above, page 34.

136/ Arizona v. California, 373 U.S. 546, 601 (1963).

jurisdiction,- and the United States of America may comply with the State laws which are involved - both of which propositions are denied, the National Government could change to uses other than those claimed in the litigation only upon the approval of the State Engineer of Utah.[137] It is difficult to perceive a more direct, immediate and entirely unconstitutional attempted subversion of the will of Congress to the States.

(d) Protection of appropriative rights Acquired Prior to "effective" Date of Reservation

Any right acquired in conformity with State law between the year 1848 and the date the reservation is 'effective' must, of course, be recognized. Thus in the exercise of the 'Winters Doctrine Rights' care has been taken to avoid the invasion of private rights. Identically the same principles apply in regard to rights in the land which were acquired prior to the 'effective' date of the reservation as are applicable to rights to the use of water.

MONTANA'S INDIANS' 'WINTERS DOCTRINE RIGHTS" IMPERILED BY CONSTRUCTION OF ARIZONA v. CALIFORNIA

Montana's Crow Indians and other similarly situated Indians who occupy reservations created by Treaties with the United States of America, are especially imperiled by the construction of the decision in Arizona v. California by the Department of Justice. Title to 'Winters Doctrine Rights' has been recognized by the Supreme Court to reside in the Crows.[138] To state that the time of the reservation 'dates' the

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137/ See above, page 34.
138/ United States v. Powers, 305 U.S. 527 (1938).

Crows' rights, as was declared regarding the Indians in the Lower Basin of the Colorado, would be a glaring mistake. For the Crows, the Fort Belknap and other Indians held title to their "Winters Doctrine Rights antecedent to their Treaties. Quite obviously, moreover, the source of their titles is not the National Government. For as Judge Pope points out in regard to the Treaty rights of the Yakimas: * * * the treaty was not a grant of rights [from the United States of America] to the Indians, but a grant of right from them [to the United States of America] a reservation [by the Indians] of those not granted." 139/ Consequently title to the "Winters Doctrine Rights" has been held since time immemorial and any effort to "date" them with a priority is a clear-cut invasion of the rights of the Indians.

IRREPARABLE DAMAGE TO THE NATIONAL GOVERNMENT THROUGH ATTEMPTED APPEARANCE IN UTAH LITIGATION

(a) "Winters Doctrine Rights" In Utah's Litigation Involve Small Unrelated Widely Scattered Springs and Dry Washes; Litigation Does Not Involve Adjudication of "river system or other source" of Water

There is embraced in the Utah litigation a vast desert area comprising six (6) counties and including virtually all of Southwestern Utah. In that immense area the principal characteristic is a grave shortage of water. For the most part the water resources consist of small springs, wells, dry washes, and undeveloped ground water.

Large acreage within the area in question is owned by the National Government comprising National Forests administered by the

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139/ United States v. Ahtanum Irrigation District, 236 F.2d 321, 326 (C.A.9, 1956); Cert. denied, 352 U.S. 988 (1956).

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Department of Agriculture[140] and Grazing Districts administered by the Department of the Interior.[141] Situated on those Nationally owned lands are numerous springs and other waters of the nature mentioned above. Those sources are essential to provide water for the livestock which graze the lands in common pursuant to licenses issued by the Federal agencies to the ranchers in the vicinity. Control of the water is tantamount to the control of those lands.

(b) Grave Error Made in Regard to Attempted Submittal of "Winters Doctrine Rights" to State Courts

Among the elements contributing to the great value of "Winters Doctrine Rights" is that, as contrasted with State appropriative rights, they are reserved "to satisfy future as well as present needs * * *."[142] Irrespective of that fact, the United States Attorney is directed to abandon the "Winters Doctrine Right" if the priority for the State right is earlier than the date of the reservation - a meaningless fact as has been emphasized.

Neither the Department of Justice nor any other agency should be permitted to attempt thus to dissipate the Nation's property. Nevertheless it is manifest the course of conduct which has been described (a) casts a cloud upon the title to the "Winters Doctrine Rights ; (b) creates far-reaching and most difficult legal problems and precedents. For example, assuming there could be compliance by the National Government with State law concerning the acquisition of rights to the use of water, this question is presented: Are those rights which will not be used until some future date subject to all of the laws of the States?

140/ 16 U.S.C. 521 a.

141/ 43 U.S.C. 315 a.

142/ Arizona v. California, 373 U.S. 546, 600 (1963).

It is fundamental that the rights of the National Government are not subject to loss by forfeiture or estoppel.[143] Yet Utah law provides that when an appropriator "* * * shall abandon or cease to use the water for a period of five years the right shall cease and thereupon such water shall revert to the public * * *."[144] Quite obviously if that statute were applicable, for reasons discussed above, the Nation could experience irreparable damage through forfeiture of greatly needed and invaluable water resources. This anomaly is reemphasized: The United States of America owns the 'Winters Doctrine Rights' but seeks to abandon them' and to prove - to its irreparable damage - new rights under State law. This is a shameful waste of Federal property and dissipation of Federal funds.

(c) Failure to Comprehend That the National Government Has Not Waived Its Immunity From Suit in the Utah Litigation

(i) General Principles Governing Waiver of Sovereign Immunity From Suits of State and Federal Governments

Plain and serious error has been made by the Department of Justice through its attempted appearance in the Utah litigation. That statement is predicated upon the immunity of the National Government from suit except where that immunity has been expressly waived. Principles of the doctrine of immunity are equally applicable to Utah. On the subject the Supreme Court of the United States declared: 'We conclude that the

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143/ United States v. California, 332 U.S. 19 (1946).
144/ Utah Statutes Annotated 1953, Sec. 73-1-4
See In Re Drainage Area of Bear River In Rich County, 12 Utah (2) 1; 361 P.2d 407 (1961);
In Re Escalante Valley Drainage Area, 12 Utah (2) 112; 363 P.2d 777 (1961).

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Utah statutes fall short of the clear declaration by a State of its consent to be sued in the federal courts which we think is required before federal courts should undertake adjudication of the claims of taxpayers against a state.[145] In an earlier case the Supreme Court in these terms applied the same principles to the United States of America: "* * * whoever institutes such proceedings [against the National Government] must bring his case within the authority of some act of Congress."[146] Moreover, the fact that an abortive appearance has been attempted is not controlling, for "Where jurisdiction has not been conferred by Congress, no officer of the United States has power to give any court jurisdiction of a suit against the United States."[147] Indeed, the Attorney General himself by his appearance may not submit the United States of America to jurisdiction under the circumstances appertaining in this action.[148] It must, of course, be recognized that absent reversal of the course being taken in the Utah litigation, it matters little that it is contrary to the law.

(ii) There Is No "Case" or "Controversy" Involving the "Winters Doctrine Rights" of the United States of America

There is not a scintilla of evidence or indication that the United States of America is asserting adversely to any one its numerous highly valuable but very small "Winters Doctrine Rights." As a consequence the action is not one which the National Government could initiate in its own forums or remove to the Federal courts. Otherwise

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145/ Kennecott Copper Corp. v. Tax Commission, 327 U.S. 573, 579, 580 (1945).
146/ Belknap v. Schild, 161 U.S. 10, 16 (1895).
147/ Minnesota v. United States, 305 U.S. 382, 386, 389 (1938).
148/ Stanley v. Schwalby, 162 U.S. 255 (1895).

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stated, it is not a 'controversy' in the Constitutional sense of the word, which must be definite and concrete, touching the legal relations of parties having adverse legal interests. * * * It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. * * * [149] Testing the innumerable 'Winters Doctrine Rights' which are claimed against the established criteria for determining whether federal jurisdiction could attach, it is obvious that, here there is no '* * * concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged * * *.' [150]

(iii) Congress Has Not Consented To The Joinder of the United States of America In The Utah Litigation

One must turn to the subject matter of the proceeding to determine whether there is a case or controversy within the purview of the Constitution. As stated above, the rights of the National Government are widely separated small springs and other water sources. Examples of those water resources listed by the Bureau of Land Management are of particular interest. The Number 1 claim is 'Gold Spring Wash'; Number 2 claim, 'Sawmill Spring Area'; Number 3, 'Unnamed Normally Dry Wash'; Number 4, 'Snow and Rain Runoff'; Number 5, 'Underground Water.' That list sets forth 116 comparable claims. Based upon available

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149/ Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 240-241 (1936) and cases cited.

150/ Ibid., 300 U. S. 227, 241 (1936).

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information it is safe to say that the waters of the sources in question do not leave the lands of the National Government upon which they arise. Moreover, from the face of the summons served upon the Attorney General by the State of Utah there is no allegation or averment of the existence of a controversy or adverse claim between the United States of America and any one else. Necessarily this question is squarely presented: Is there any basis in law for the attempted appearance by the Department of Justice in this proceeding? That inquiry is now considered.

There has been no waiver of sovereign immunity from suit by the National Government in the Utah litigation. A most careful search of the law fails to reveal that the Congress has authorized the Department of Justice or any other agency to appear and attempt to prove in State courts the widely scattered, disconnected and wholly unrelated springs, unnamed washes and wells which are involved.

In expressing the conclusions set forth above particular reference has been made to 43 U. S. C. 666 purporting to authorize the appearance of the United States of America in suits for the adjudication of water rights. There it is specifically provided that the Congress consents to the joinder of * * * the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise,

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and the United States is a necessary party to such suit. * * *" 151/

(Emphasis supplied)

In the paragraphs which succeed the principal provisions of the law above quoted are applied to the facts involved.

Key provision in the Act relied upon in the attempted joinder of the United States of America in the Utah litigation is the term "river system or other source." In view of that provision it is to be noted the caption in the cause refers to the "Drainage Area of the Beaver River-Escalante Valley, And All Tributaries", an area embracing thousands of square miles of desert. The magnitude and characteristics of the area have been discussed. A careful review reveals the vast

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151/ § 666. Suits for adjudication of water rights.

(a) Joinder of United States as defendant; costs.

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, That no judgment for costs shall be entered against the United States in any such suit.

(b) Service of summons.

Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Joinder in suits involving use of interstate streams by State.

Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream. (July 10, 1952, ch. 651, title II, § 208 (a) - (c), 66 Stat. 560.)

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majority if not all of the springs, dry washes and wells are not a part of a 'river system or other source' within the contemplation of the Act. Rather, those 'Winters Doctrine Rights' in the vast majority of cases, if not all, never flow beyond the lands of the National Government where they arise. Thus those rights do not constitute a part of a river system or source of water, to which the above-quoted 43 U.S.C. 666 pertains. As a consequence the Utah litigation does not come within the purview of the last cited Act and those small, widely scattered springs and other water sources cannot be subjected to the jurisdiction of the Utah court because the National Government has not waived its sovereign immunity from suit in regard to them.[152] It is denied that the Congress intended, when it consented to the joinder of the United States of America in actions of the character mentioned, to submit the hundreds of widely scattered unrelated sources of water to State control.

On repeated occasions the breadth of application of 43 U.S.C. 666 has been before the courts. As the Court of Appeals for the Fifth Circuit declared: 'The United States has not given its consent to be joined as a defendant in every suit involving water rights. It may be made a party only in suits 'for the adjudication of rights to the use of water of a river system or other source.'"[153] Obviously, the very small but invaluable rights of the United States are not part of a river system. They are at most within a general geographical area, not a stream system. Indeed, there is no assertion that these waters are a part of a river system or other source of water.

152/ See principles respecting sovereign immunity from suit set out above, pages 54 et seq.

153/ Miller v. Jennings, 243 F.2d 157, 159 (C.A.5, 1957); Cert. denied 355 U.S. 827 (1957).

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In another case where it was agreed that the claims of the United States of America did not conflict with any other rights, the Court of Appeals for the Ninth Circuit declared that 43 U.S.C. 666 was limited to suits "to establish the relative rights of users of the waters of a stream or other common source: one to settle disputes between such water users with respect to their rights among themselves."[154] To say that several hundred disconnected widely scattered springs and dry gulches constitute a common source would again be contrary to fact.

More recently the Court of Appeals for the Ninth Circuit exhaustively reviewed the waiver of sovereign immunity from suit here under consideration.[155] Having analyzed the express language of 43 U. S. C. 666 and the legislative history, it declared:

> '[the legislation] is not intended to be used * * * for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream.'[156] (Emphasis supplied)

As to the nature of the suit to which the waiver of immunity was intended to have application, this statement is made: '* * * it was the quasi-public proceeding which in the law of western waters is known as a 'general adjudication' of a stream system.

154/ Nevada v. United States, 272 F.2d 699, 701 (C.A.9, 1960).
155/ State v. Rank, 293 F.2d 340 (1961); affirmed as to ruling on 43 U.S.C. 666, reversed on other grounds, Dugan v. Rank, 372 U.S. 609 (1963).
156/ Ibid., 293 F.2d 340, 347 (1961).

one in which the rights of all claimants on a stream system, as between themselves, are ascertained and officially stated." 157/

Recently the Supreme Court with reference to the last cited decision declared:

"We agree with the Court of Appeals on this issue [its construction of 43 U.S.C. 666] * * *. It is sufficient to say that * * * 43 U.S.C. 666, * * * providing that the United States may be joined in suits 'for the adjudication of rights to the use of water of a river system or other source,' is not applicable here."

The Court emphasized that the waiver contemplated

"* * * a case involving a general adjudication of 'all of the rights of various owners on a given stream'". 158/ (Emphasis supplied)

Let this fact be emphasized: There is no "given stream" in the Utah litigation in which the United States of America claims in conflict with individual owners. The Congressional waiver didn't contemplate moot questions not needing resolution. The "general adjudication" proceeding to which it is directed is in the nature of a quiet title suit to declare, adjudge and determine the conflicting rights of all parties in a stream system. 159/ Congress did not intend the wholly futile,

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157/ Ibid., 293 F.2d 340, 347 (1961).
158/ Dugan v. Rank, 372 U.S. 609, 617, 618 (1963).
159/ Wiel, Water Rights in the Western States, Vol. 1, Sec. 654, p. 726 et seq.

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wasteful and needless joinder of the United States pertaining to tiny springs, widely dispersed and in no way related to a river system.

CONCLUSION

"Winters Doctrine Rights" to the use of water are of immense value to the Indians and to the United States of America as a whole. They are unique, being free of the limitations and restraints inherent in the appropriative and riparian rights acquired by compliance with State law.

Title to the "Winters Doctrine Rights" was ceded to the United States of America by Treaties with the Indians, France, Great Britain and Mexico. Date of acquisition of those rights is the time of the cession. They were conveyed by those Treaties as part and parcel of the land.

There is an unbroken chain of title to the "Winters Doctrine Rights" in the United States of America dating back to the Treaties ceding those rights to it. Severance of that chain of title by claiming a date subsequent to the Treaties constitutes an abandonment of invaluable rights. Moreover, any severance of that chain of title casts in doubt the source of title, the character, nature and measure of the "Winters Doctrine Rights."

"Winters Doctrine Rights" were at one time open to private acquisition pursuant to provisions of the Desert Land Act of 1877 and Acts antecedent to it. However, they and the lands of which they are a part were withdrawn from the status of being available for acquisition from and after the dates they were reserved for the Indians, National

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Forests and other National reservations. Those withdrawals of the 'Winters Doctrine Rights' had no effect upon the source of title, the date of their acquisition or the nature or character of them.

Plain and serious error has been committed by the Department of Justice in its interpretation of the recent decision of Arizona v. California. In substance it has declared that the last-cited decision constituted an abridgment of the Winters Doctrine by fixing the inceptive date of title to the 'Winters Doctrine Rights' as the date of reservation of them. That constitutes a severance of the chain of title; an abandonment of invaluable rights reserved for the Indians by failing to claim the earliest possible date of acquisition of those rights; and casting doubt upon the source of the title, the nature and character of those rights.

Compounding the grave error in construction of the decision of Arizona v. California is the precedent established in the case now pending in a Utah State court in which the Department of Justice has made an attempted appearance. It is impossible to perceive a more damaging course of action than that being pursued in the Utah litigation. As stated, it constitutes a construction of the Arizona v. California Decision which involves an abandonment of 'Winters Doctrine Rights' and a break in the chain of title to those rights.[160] Moreover, in that litigation the Department of Justice purportedly authorizes abandonment of invaluable 'Winters Doctrine Rights' in exchange for vastly inferior State appropriative rights.[161] It is free from doubt that the United States of America cannot and most assuredly should not pursue that course. Yet the appearance made in the Utah litigation could - if the lack of

160/ See above, pages 25 et seq.
161/ See above, pages 46 et seq.

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jurisdiction of the court is not attacked - result in the loss of the Winters Doctrine Rights.

Congress has not waived the immunity of the National Government from suit under the circumstances presented. As a consequence a more strenuous challenge to the jurisdiction of the Utah court must be interposed. If necessary, an independent action in the federal courts should be initiated with the objective of having determined in our Nation's own forum the validity, breadth and applicability of 43 U.S.C. 666. Similarly there would be tested the title of the Winters Doctrine Rights. Basically, the Department of Justice should not be permitted to formulate a drastic and far-reaching policy in regard to Winters Doctrine Rights - or any other - without a clear mandate from Congress which it does not have in the Utah litigation.

Every Indian right and every right of the United States of America predicated upon the Winters Doctrine has been imperiled. From the precedent there will flow irreparable damage to the Indians and National Government. Fulfillment of the trust responsibility to the Indians and the obligation of the Department of Justice to the Nation as a whole call for a rejection of the precedent in question and a reversal of the course of action in the Utah case.

January 28, 1964 William H. Veeder

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